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Keurig Dr Pepper, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHN PELS, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

KEURIG DR PEPPER, INC.,

Defendant.

Case No. 3:19-cv-03052-SI

**DEFENDANT KEURIG DR PEPPER,
INC.'S REPLY IN SUPPORT OF
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF MOTION TO DISMISS
AMENDED CLASS ACTION COMPLAINT**

[Fed. R. Evid. 201]

Date: October 17, 2019
Time: 10:00 a.m.
Courtroom: Courtroom 1, 17th Floor
Judge: Hon. Susan Illston

1 Exhibit B to the Declaration of Charles C. Sipos is the Consumer Reports article on which
2 Plaintiff's Complaint relies, and that Plaintiff submits with his own request for judicial notice.
3 Exhibit C to the Sipos Declaration is a press release in which Keurig Dr Pepper ("KDP")
4 announced the Peñafiel Water voluntary withdrawal. Plaintiff excerpts portions of these
5 documents in his Amended Complaint and relies on them heavily. *See* Am. Compl. ¶¶ 23, 25
6 (excerpting large portions of both documents). They are therefore judicially noticeable under the
7 incorporation by reference doctrine. *United States v. Richie*, 342 F.3d 903, 907 (9th Cir. 2003).
8 Plaintiff's arguments to the contrary misunderstand the facts and the law.

9 Plaintiff argues in his Opposition to Defendant's Request for Judicial Notice that certain
10 statements in the press release (Exhibit C) are not judicially noticeable. RJN Opp. at 2–3 (arguing
11 that statements in release about the nature of arsenic not judicially noticeable). That is wrong. The
12 incorporation by reference doctrine, on which KDP relied in its request for judicial notice, RJN at
13 3, "prevents plaintiffs from selecting only portions of documents that support their claims while
14 omitting portions of those very documents that weaken—or doom—their claims." *Khoja v.*
15 *Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). In other words, Plaintiff can't
16 cherry-pick facts from a document on which he relies to make his case. *Id.* That is particularly
17 true where, as here, Plaintiff pleads the precise facts he asks the Court to ignore. *See* Am. Compl.
18 ¶ 18 (alleging that arsenic is a naturally occurring element); *id.* ¶ 25 (excerpt from KDP press
19 release stating that arsenic is harmful only at very high levels).

20 Plaintiff's challenge to portions of the Consumer Reports article (Exhibit B) is similarly
21 unavailing. For one, Plaintiff asks the Court to take judicial notice of this same article, so it is
22 unclear what he objects to. *See* ECF No. 37. Once the document is judicially noticed, KDP is
23 entitled to cite parts of it that undermine Plaintiff's complaint, such as the undisputed fact that
24 Consumer Reports does not specify the testing method it used. *See* Sipos Decl. Ex. C; *Sprewell v.*
25 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not, however, accept
26 as true allegations that contradict matters properly subject to judicial notice.").

27 KDP's Request for Judicial Notice should be granted in full.
28

1 DATED: October 4, 2019

PERKINS COIE LLP

3 By: /s/ Charles Sipos

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 4, 2019, I caused to be filed via the CM/ECF system true and correct copies of the forgoing document and that the service of this document was accompanied on all parties in the case by CM/ECF system.

/s/Charles C. Sipos

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